

DRAFT

19 April 1973

MEMORANDUM FOR: Dr. James B. Rhoads
Acting Chairman, ICRC

SUBJECT : ICRC Jurisdiction Regarding Intelligence
Sources and Methods

1. You will recall that at the March meeting of the Committee I reported new CIA action with respect to the AP appeal to ICRC of the CIA denial of declassification of certain documents concerning the Guatemalan incident of 1954. By way of background, several months ago CIA had concluded that the documents requested by the AP must remain classified. When the AP appealed this decision to the ICRC, the Agency did not furnish the documents for review by ICRC, the Director taking the position that it would be inappropriate to do so in light of the denial of declassification and his statutory responsibility to protect intelligence sources and methods from unauthorized disclosure. See the attached memorandum of 27 November to the Chairman and members of ICRC by the Acting General Counsel of CIA. Chairman Eisenhower reported the impasse to the President, whereupon Mr. Ehrlichman and Mr. Helms exchanged letters on the matter. Possible further action was overtaken by the fact of Dr. Schlesinger taking office as Director. Mr. Schlesinger then reviewed the exchange of correspondence between Mr. Ehrlichman

and Mr. Helms and wrote to Mr. Ehrlichman that, like Mr. Helms before him, he believed determinations and decisions by the Director of Central Intelligence involving intelligence sources and methods should be exempt from the jurisdiction of ICRC. Mr. Schlesinger advised Mr. Ehrlichman that he was requesting Chairman Eisenhower to permit us to withdraw the AP matter from the ICRC agenda. Further, he was ordering the documents in question re-examined with the view to removing the issue of intelligence sources and methods to the extent possible, with the hope that this could accommodate the AP's desires. He said also he would pursue directly with the ICRC the matter of the exemption of intelligence sources and methods ~~question~~ from ICRC jurisdiction. See the attached exchange of correspondence between Ehrlichman and the two Directors of Central Intelligence.

2. My purpose in this memorandum is to request ICRC agreement that ICRC should not have jurisdiction on matters concerning intelligence sources and methods, including specifically appeals from departmental refusals to declassify. If the Committee can so agree, it then should be relatively simple to determine that the existing Executive Order and NSC Directive permit interpretation to that effect, or that they do not, in which event it would be necessary to request an appropriate amendment to the Order. Resolution of this issue would also enable the Committee to finalize its procedures for

publication in the Federal Register, as agreed at the March meeting.

3. Our legal reasoning that intelligence sources and methods are exempt from ICRC authority is developed in our 27 November letter to ICRC and in the letters of Messrs. Helms and Schlesinger to Mr. Ehrlichman. Essentially, we argued that the National Security Act is specific that the Director of Central Intelligence is responsible for protecting intelligence sources and methods from unauthorized disclosure, that principle is endorsed and solidified in other statutes and it has been recognized and upheld in various judicial decisions. See the exchange of correspondence between Mr. Ehrlichman and the two Directors.

4. Additionally, the National Security Council has issued directives specifically requiring protection of intelligence sources and methods by the Director and the United States Intelligence Board and requiring various actions by those officials. See NSC Directive No. 1, February 1972. We believe it cannot be seriously argued that that Directive, dealing specifically with intelligence activities and imposing *sources and methods* ~~various~~ responsibilities on the Director of Central Intelligence and the United States Intelligence Board and revised extensively just prior to ~~the~~ issuance of E.O. 11652 (February and March 1972 respectively), was intended to be overridden by the Executive Order or by the NSC Directive of May.

5. Moreover, it would seem illogical for the ICRC to have jurisdiction in matters of intelligence sources and methods if it is not also to have atomic energy jurisdiction. (The Committee, you will recall, has agreed to include in its procedures language denying jurisdiction "of appeals involving information classified by the Atomic Energy Act of 1954" and the Executive Order is authority for such action.)^{1/} The Atomic Energy Act creates a category of information, called Restrictive Data, and provides for its protection by the Atomic Energy Commission. The Commission thus has statutory authority to protect Restricted Data and is not dependent on the Executive Order in this regard. It would follow that if ICRC had authority to declassify atomic energy information under the Executive Order, any declassification action by ICRC would accomplish nothing because the Commission would continue to protect Restricted Data under the authority of the Atomic Energy Act. It would seem odd, therefore, to free atomic energy information from the threat of Executive Order declassification by other than the Atomic Energy Commission, and not provide similar protection for intelligence sources and methods, which lacks specific statutory protection of the nature of that afforded by the Atomic Energy Act.

^{1/} We are not suggesting that ICRC should have atomic energy jurisdiction. CIA has agreed to the proposed procedures paper, with the reservation concerning intelligence sources and methods, and we continue to support such exemption.

6. Above and beyond these somewhat legalistic points is a fundamental consideration. Authority in an outside body to review and overrule decisions of intelligence officials to protect intelligence sources and methods is inconsistent and incompatible with the concept of the intelligence-gathering function. As Mr. Helms asserted in his letter of 29 January:

The source-and-method problem is fundamental to the effective operation of an intelligence activity. It recognizes that a fiduciary relationship is established between a source and the Agency. The Agency's general reputation for respecting such fiduciary relationships is essential to any hope of recruiting new sources and exchanging sensitive material with foreign intelligence services whose history and secrecy have endured for centuries. The content of the information involved is not of primary concern, as it well may be innocuous in itself, but if it reveals the source protection must be provided.

And further from Mr. Helms' letter:

The reason I am reluctant to submit the papers to the ICRC is that any indication that an intelligence agency can be forced to reveal its sources and methods to outside review seriously reduces the confidence of those current and future sources and liaison relationships that are essential to the intelligence function.

In retrospect, it may be that Director Helms would have been well advised to stress this position when the Executive Order was nearing the stage of approval. But there was no suggestion at that time, in the language of the draft order or otherwise, that we ^{would} might be faced with an NSC Directive more far-reaching than the Executive Order

itself and one which would vest in ICRC authority to act on appeals from departmental decisions on declassification. In any event, we deem it essential to the foreign intelligence function that the Director's statutory responsibility to protect intelligence sources and methods continue unimpaired and that it be fully supported by Executive Branch actions. Accordingly, we request ICRC agreement to that effect and specifically that ICRC will have no jurisdiction as to appeals from declassification requests involving intelligence sources and methods. It is our view also that if the Committee is willing to reach such an agreement, it could advise the White House that it so interprets the Executive Order, in the context of the provisions of the National Security Act of 1947, and it would not be necessary to request an amendment to the Executive Order. (The Department of Justice memorandum of _____ concerning the procedures to be adopted by ICRC may not be consistent with this view, but that memorandum was directed to another problem and it may be that the implications of the National Security Act were not fully considered.) If, however, the Committee, though willing to agree to our request, believes that the Executive Order will not permit the requested interpretation, we would want to offer an appropriate amendment to the Executive Order.

LRH